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HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 159

EUGENE M. MURPHEY, JR., ET AL.,
Petitioners,

versus

M. T. REED, ET AL., a co-partnership doing business as M. T. REED CONSTRUCTION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EUGENE M. MURPHEY, JR., ET AL.,
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versus

M. T. REED, T. L. REED, JR., MRS. M. T. REED, MRS. T. L. REED, JR., and MRS. S. S. HAIRSTON, Co-Partners, doing business as M. T. REED CONSTRUCTION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The Petition of Eugene M. Murphey, Jr., and others who were Plaintiffs in the District Court, respectfully show unto this Honorable Court recovery for the Plaintiffs was awarded by the District Court from which judgment an appeal was taken to the United States Court of Appeals for the Fifth Circuit, and the cause was reversed and remanded to the District Court, 168 Fed. 2nd 257. Thereafter, certiorari was granted by the United States Supreme Court on November 15, 1948, and the cause was reversed, 335 U.S. 865, 93 Law Ed. 410, and remanded to the District Court with directions. The cause was then tried again in the United States District Court resulting in judgment in favor of the Petitioners herein. An appeal by the

Respondents herein was then taken to the United States Court of Appeals and the judgment of the District Court was reversed and rendered.

(a) The opinion of the United States Court of Appeals for the Fifth Circuit is not yet officially reported, but will appear in Federal Reporter, Second Series. The opinion of the United States District Court for the Southern Division of the Southern District of Mississippi is not officially reported, but is found on pages 677-894 of the Record, and further opinion of the District Court is found at pages 897-901 of the Record. Jurisdiction is invoked in this case, as the Court of Appeals has decided an important question of Federal Law which should be settled by this Court, and has decided Federal questions in a way in conflict with applicable decisions of this Court, and has departed from following the interpretations of this Court on the questions involved.

(i) The judgment sought to be reviewed is dated March 16, 1956, and was entered on March 16, 1956.

(ii) There was no application for a re-hearing.

(iii) The statutory provision believed to confer jurisdiction on this Court is Section 1254, Title 28, United States Code Annotated.

(c) The questions presented for review are:

1. Whether or not the defense of the Portal to Portal Act, and particularly Section 9 thereof, was sustained

under the proof in this case and in the face of the findings of fact by the trial Court.

2. Whether or not the Court of Appeals for the Fifth Circuit was correct is completely overturning the findings of fact and conclusions of law of the trial Court in violation of Federal Rules of Civil Procedure 52(a), particularly in view of the Court's finding of fact sustained by overwhelming testimony, that the Defendants falsified their books and records in order to keep the time in accord with their interpretation of the Act. (District Court's Opinion, R. 899).

(e) This case was originally brought in the District Court in a suit for overtime, penalties and attorneys fees resulting in a decision and judgment in favor of the Plaintiffs. Upon appeal, the Fifth Circuit reversed the cause and thereafter certiorari was granted by the United States Supreme Court, and the cause was reversed and remanded back to the District Court with instructions to dismiss those causes involving solely new construction work and to consider the remaining causes in the light of the Supreme Court's decision in the Silas Mason case. The Defendants interposed defense under the Portal to Portal Act, and particularly under Section 9 thereof, and the Court then proceeded to comply with the mandate of this Court and examine each Plaintiff's claim in detail, embodying his findings of fact and conclusions of law as to each individual Plaintiff in the rather lengthy opinion of the Court, dismissing the claims of all Plaintiffs who were engaged solely in new construction work as directed by the mandate, and entered judgment for wages, penalties and attorneys fees

on those claims which the Court found to be sustained by the proof. On appeal, the Fifth Circuit reversed and rendered the decision of the lower Court on the ground that the findings of fact of the Court, and conclusions of law based thereon, were clearly erroneous, and that the Defendants had sustained their defense under the Portal to Portal Act.

(g) This case arises under the Fair Labor Standards Act, 29 U.S.C.A. 201, 216(b), and jurisdiction is conferred upon the District Court by Section 1331, 28 U.S.C.A., and by Section 216(b) 29 U.S.C.A.

(h) The decision in this case is in conflict with the decision of the United States Supreme Court in the cases of Morris Steiner, et al, vs. James P. Mitchell, 76 Supreme Court 330 and James P. Mitchell vs. King Packing Company, 76 Supreme Court 337.

The decision in this cause is in conflict with the case of Kennedy, et al, vs. Silas Mason Company, 334 U.S. 249, 68 Supreme Court, 1031, and the decision of the Court of Appeals in this cause is in conflict with the directions contained in the action of this Court when certiorari was granted and the cause remanded to the District Court after the prior decision in this cause by the Court of Appeals for the Fifth Circuit, 335 U.S. 865, 93 Law Ed. 410.

The Circuit Court of Appeals is not authorized to completely overturn the findings of fact and conclusions of law based on them as found by the District Court, where the evidence overwhelmingly and amply sustains the finding

of fact made by the District Court, Federal Rules of Civil Procedure, 52(a).

The trial Court is better able than the Court of Appeals to judge the weight and credibility of witnesses.

(i) There is appended hereto, in the Appendix, a copy of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

WHEREFORE, Petitioners pray that a writ of certiorari be granted to the United States Court of Appeals for the Fifth Circuit, and that this Court review the opinion, and that judgment of said United States Court of Appeals of the Fifth Circuit and reverse the judgment thereof.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15,521

M. T. REED, T. L. REED, JR., MRS. M. T. REED, MRS. T. L. REED, JR., and MRS. S. S. HAIRSTON, co-partners doing business as M. T. REED CONSTRUCTION COMPANY,

Appellants,

versus

EUGENE M. MURPHY, JR., ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(March 16, 1956.)

Before HUTCHESON, Chief Judge, and JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge: A judgment awarding overtime wages, penalties and attorneys' fees under the Fair Labor Standards Act, 29 U.S.C.A. 201, 216(b), against appellants, Contractor for the United States Navy under

two cost-plus-fixed-fee, wartime, contracts[1] is again before us for review.[2]

Since what it did, it did under the express direction of the United States Navy, the question is whether Contractor owes the overtime with like penalties for obeying these orders. More accurately, it is whether the public Treasury shall be required to pay since the cost, including litigation expense, if imposed, is fully reimbursable, *Powell v. United States Cartridge Co.*, 339 U.S. 497, 94 L.Ed. 1017. The case, which otherwise presents many complex, important additional matters of partial or complete defense not

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1 The contracts were for (1) the construction of a training camp for Navy Construction Battalions ("Seabees") and a Naval Advance Base Depot at Gulfport, Mississippi, and (2) the maintenance and operation of the Advance Base Depot.

2 Brought originally by 121 plaintiffs, recovery was originally allowed for 117, but on appeal this Court reversed, 168 F.2d 257, (1948), on the basic ground that the employees were not engaged in commerce under the Act. Chief Judge Hutcheson dissented on this phase. On the plaintiffs' petition for certiorari, the Supreme Court, November 15, 1948, took action, per curiam, 335 U.S. 865, 93 L. Ed. 410:

> "The petition for writ of Certiorari is granted. The judgments below 168 F.2d 257 are vacated and the case remained to the District Court with instructions to dismiss those causes of action involving solely construction work, and to reconsider the remaining causes of action in the light of decision of this Court in Kennedy et al v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031.
>
> "Mr. Justice Rutledge is of the opinion that the case as a whole should be remanded to the District Court for further proceedings in view of the decision of this Court in Kennedy et al v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031.
>
> "Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy; dissent."

We expressly stated (168 F.2d 257 at 262) that defendants were entitled to assert any defenses authorized by the Portal-to-Portal Act, 1947, Public Law 49, 80th Congress, 1st Session, 29 U.S.C.A. 251, enacted subsequent to judgment in the District Court.

The retrial, under the remand, with judgment for 72 plaintiffs, was on the original record on coverage and the nature and hours of work. The new evidence produced at the hearings, December 1950, October 30, November 1, 1951, related solely to the Portal-to-Portal Act good faith defenses. The witnesses were dealing, then, in matters occurring 7-½ to 8 years before.

reached or passed on[3] comes down to this because, in our judgment, it turns on the good faith escape provisions of the Portal-to-Portal Act.[4]

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[3] These include the interpretation and application of the Supreme Court mandate, whether it foreclosed claims for all working on the "construction" contracts or merely those engaged individually in such pursuits, the evidence as to the activities, coverage and hours worked by each of the 72 plaintiffs, the status of certain employees during work predominantly for the Navy, not the Contractor, the application to some of the administrative or professional exemption under §13(a)(1), the calculation of the regular rate for computation of overtime, if due, and the application of the Mississippi one-year Statute of Limitation, §731, Mississippi Code 1942. The Trial Court's opinion, findings of fact and conclusions of law, cover 217 pages, all but 14 of which are a detailed treatment as to the status, coverage, wage and hours worked by each of the individual plaintiffs.

[4] Public Law 49, 80th Congress, 1st Session, 29 U.S.C.A. 251:

"SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.
[29 U.S.C.A. 258]

"SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act."
[29 U.S.C.A. 260]

Since the District Court held[5] this defense was not made out, we must examine the evidence in some detail. Work under the construction contract began April-May 1942 and was completed April 6, 1943. Actual operations of the Advance Base Depot under the Management and Operating Contract began July 1, 1942. Only the period from July 8, 1942, to August 1943 is involved here.

Responsibility for such construction projects was in the Bureau of Yards and Docks which, acting for the Secretary of the Navy, had the full status of an Agency of the United States, 5 U.S.C.A. 429. The Bureau of Yards and Docks was represented by the Contracting Officer whose decision, for all practical purposes, was final.[6] As the Contractor was certainly justified in carrying out their orders, the initial inquiry relates to the actions taken by the Bureau or its plenary agent.

It simplifies the problem to start with an agreed point and work back to the beginning. On May 17, 1943, the Bureau declared, and the Contractor was advised, categorically that the Fair Labor Standards Act did not apply to Government cost-plus-fixed-fee contracts.[7] There was

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[5] The Court held that: (1) neither Navy nor its Bureau of Yards and Docks (BYD), prior to May 11, 1943, had any ruling, policy, or practice with reference to applicability of FLSA; (2) the Contractor had no knowledge of any ruling, policy, or practice of the Navy or BYD on such matter; (3) but Contractor did know after May 17, 1943 of Wage and Hour Division interpretation that FLSA did apply; (4) Contractor never relied on any Navy, BYD, ruling, policy, or practice.

[6] Except for a few trivial differences, the language is identical with that set out in the note in United States v. Wunderlich, 342 U.S. 98, 99, 96 L.Ed. 113, 115.

[7] This formal ruling was precipitated by a triple inquiry concerning overtime for one employee, Nash, April 1, 1943, receipt by the Contractor of the Regional Office Wage & Hour Division's letter

nothing about that action, however, which indicated that that was the declaration of a new policy. On the contrary, it was merely the precise application of the policy long established.

Among those testifying were former naval officers having personal knowledge of these matters both in the Bureau and on this job. Commander Goodrich, an experienced lawyer, long-time employee of the United States Department of Labor, Assistant Director of the Labor Relations Division, Bureau of Yards and Docks, who had direct and immediate responsibility for these affairs and was in continuous contact with CPFF Navy projects throughout the United States and with all of the Executive Departments, was emphatic that, from the beginning, it was the Navy's policy that these contracts were not under the Act. He had, on many occasions, relayed that policy to contacting officers, including those on this project, and had himself prepared for the Bureau's signature these letter-rulings in April-May 1943. Commander Dickeman, Officer-in-Charge and Contracting Officer June 1, 1942 through November 25, 1942, on this project, from the

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of March 31, 1943, asserting the employees were subject to FLSA and letters April 16, 29, 1943, concerning the claim by one of the present counsel for plaintiffs on behalf of 25 employees. On Nash, the Bureau ruled April 14, 1943, "2. * * * The Fair Labor Standards Act is not applicable to the work performed * * *." The Bureau, May 11, 1943, on the claims of the 25 employees, ruled: "2. Since the Bureau does not consider the work involved under this contract subject to the Fair Labor Standards Act, the Officer-in-Charge is advised that the Bureau will reimburse for no claim for additional compensation based upon that Act until such time as the contractor may be ordered to pay such claim by a court of competent jurisdiction. Such suits * * * should be defended by the contractors * * *. The amount of any judgment * * * with * * * costs * * * and attorneys' fees, will constitute an item of cost for * * * reimbursement * * * under the contract * * *." On May 17 this was formally transmitted to Contractor.

beginning of the war had been on construction duty and knew that a firm policy was established. He had been on duty at Pearl Harbor where he first became aware of the dispatch by Admiral Moreell, Chief of the Bureau, and preparatory to his taking command in Gulfport had again been advised in the Bureau's office of this policy. And, straight from the Chief himself, came irrefutable proof. On February 21, 1941, Admiral Moreell sent a dispatch to the Commandant, 14th Naval District, stating:

> "* * * Dept has just received from Dept of Labor opinion that construction of Naval Air Bases in Western Pacific is not within coverage of the Fair Labor Standards Act X. Bureau interprets this to apply to all construction under fee contracts X. Comdt is authorized to proceed accordingly X."

Admiral Moreell further testified that this was his interpretation on behalf of the Bureau and was the policy followed throughout his incumbency (up through November 30, 1945) on all such contracts and, at his direction, he ordered that all CPFF contractors be so advised.[8] More-

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[8] It was stipulated, "2. That Admiral Ben Moreell, if called as a *witness*, would *testify* as stated in his affidavit dated June 13, 1947, heretofore filed by the defendants with the clerk of this court in response to plaintiffs' aforesaid motion to produce. Plaintiffs, however, reserve the right to object to the competency, materiality, or relevence of such *testimony* of Admiral Moreell." (emphasis supplied) The trial court sustained plaintiffs' objection that this was hearsay and not the best evidence. This was patent error in disregard of the stipulation and without any foundation; it was not hearsay since it was within the personal knowledge of the individual, more than any other, who would know. The reservations in the stipulation meant to preserve to plaintiffs only those objections which would be available had the Admiral been on the witness stand in open court. Since the issue was the *policy* of the Bureau and not the writings, themselves, in which it might be reflected, the papers, assuming their existence, were not "best" or even "better" evidence, see Wigmore on Evidence, 3rd Ed. p. 464.

over, this policy-practice did not rest upon the thin strand of one radiogram. It was reflected by many other contemporaneous and subsequent directives which by terms and practical operations were completely contrary to FLSA.[9]

Whatever uncertainty there might be concerning knowledge of it by the Contractor, there is none concerning the Bureau's policy and practice. The evidence, with overwhelming corroboration,[10] is all one way.

We test the communication of this policy-practice to the Contractor in the general setting of the contract. This committed almost absolute rule to the Contracting Officer especially on matters requiring reimbursement. Without his approval, no cost would be repaid, and if repaid without adequate basis a process of continuing audits assured the Government credit. The total labor cost, on this and similar projects, was of course a principal item. This in turn depended primarily on the scale of pay, the program for

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[9] See e.g., Circular Letters 12-42 January 21, 1942, for so-called overtime for annual, monthly, and weekly salaried employees of CPFF Contractors for hours beyond their normal work-week (not the first 40 hours); and No. 139-43, May 27, 1943, amending No. 12-42 stating overtime in terms of hours in excess of 40 but establishing a formula which, without minimum guarantee, in fact resulted in the same pay for the normal work-week.

[10] E.g., defense of these suits, at Navy expense, from 1943 down to date, pursuant to the directive of May 11, 1943.

On the existence of the *policy* and *practice*, nothing contradicted the unequivocal testimony of Admiral Morcell and Commanders Goodrich and Dickeman. The court could not simply disregard this, Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 75 L.Ed. 983; Quock Ting v. United States, 140 U.S. 417, 35 L.Ed. 501; Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 340, 77 L.Ed. 819; Foran v. Commissioner, 5 Cir., 165 F.2d 705, in the absence of contrary evidence (i.e., affirmatively showing no such policy, or some other one). Their reliability and truthfulness is in no way impugned: long since retired from the Navy, neither had any self-interest to gain or lose.

straight or overtime operations, and the method for determining overtime, if allowed.

On Commander Dickeman's assuming command, June 1942, as Officer-in-Charge (Contracting Officer), he immediately set about to assume his hightful responsibility. In conference soon after his arrival, on the matter of wages he informed the Contractor (both through one of the partners, Reed, and the Project Manager Schutt) of the Bureau's policy that FLSA did not apply. Both Reed and Schutt confirm the receipt of these instructions. Reed fixed it definitely right after Dickeman took over and before August-September 1942. Nothing detracted from these positive assertions except the natural inability of these witnesses eight years later to pinpoint the precise date, time, or circumstances of these conferences and detail the exact words used. The plaintiffs urged that anything so important would have been in writing, and the absence of categorical written memorandum casts substantial doubt on the truthfulness of this testimony of oral communication. This would be, of course, a left-handed way of reading into the Portal-to-Portal escape the necessity of *written* evidence, a contention universally rejected. Compare §9 with §10; *Lassiter v. Guy F. Atkinson*, 9 Cir., 176 F.2d 984, 992. And it completely ignores the atmosphere of a nation struggling, through a citizen armed force, impressed suddenly into new and strange responsibilites, to arm and equip itself with the greatest possible dispatch, with economy if possible, but with waste if necessary. Decisions on every level were made and communicated with informality and time-saving shortcuts. The possibilities of losses from non-use of the normal rigid procedures for the handling of

Government business was itself one of the risks of waging war. The nation's business and industrial skill had immediately to be exploited. The urgency was to get, train, equip and move men[11] to the fighting fronts. There was little opportunity for the nicer and safer procedures of peacetime. If a Squad Leader could commit his eight, a Platton Leader his forty, a Company Commander his two hundred men to almost certain casualties by an oral command, certainly a Contracting Officer in Gulfport, Mississippi, could act by voice as well as hand.

Moreover, there is positive and overwhelming corroboration. Commander Dickeman's instructions had immediate, tangible manifestations. Establishing a Wage Board to recommend wage scales, he informed the Board that FLSA did not apply, and that the normal workweek would be 48 hours. On receipt of the Board's report and recommendation, he promulgated by formal directive[12] a wage

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11 Commander Dickeman, pressed for explanation on the absence of written directives, testified:

"A. For the simple reason that we were at war at that time. We were in an emergency condition and our every effort was being bent toward getting work done expeditiously. That was my effort to handle routine red tape that applied under Naval circumstances and conditions of that kind. Just for instance—I reported to the Base on the 1st of June and I am quite certain in the first week I was here I got telephone calls from the Bureau that the first batch of Seabees would arrive on the 20th of June. In less than three weeks time we had to get hurriedly ready for 1100 men. Obviously you couldn't be thinking about a lot of written orders under circumstances like that."

12 Directive July 11, 1942:

"1. It is directed that the Contractor adhere to the following in establishing the salaries of Navy and Contractor's employees:

"(a) A six-day workweek is to be established as of 8 July, and no overtime will be paid regardless of the number of hours worked. Where present salaries required changing they

scale and labor policy effective July 8, 1942, which, plainly contrary to FLSA, if it applied, forbade overtime at all, and, in November allowed "overtime" at straight time rates.

The plaintiffs must be the last to challenge that this was done in fact, or that it was an effective determination that FLSA did not apply, for their very claims arose because of the wage policy change established by that order. And, contemporaneously, writings made years before the Portal-to-Portal Act was passed, or its defense of good faith reliance was ever heard of, show that this directive was the means by which Commander Dickeman made the Bureau's policy on non-overtime effective.[13] *Lassiter v. Guy F. Atkinson, supra* @ 992; *Northwest Air Lines v.*

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will be equitably modified, effective 8 July.

"(b) Overtime will be paid for Sunday work when properly authorized in advance. The rate of pay for overtime will be on a single time basis and *not* at a rate of time and a half.

"(c) No overtime will be paid to key men, regardless of the number of hours worked. By a key man is meant anyone who receives a salary of $75.00 or more per week."

[13] December 15, 1942, Contracting Officer reported to Bureau of Yards and Docks:

"2. At the start of the construction work under subject contract, all weekly salaried employees were compensated at the rate of time and a half for overtime performed when they worked more than 40 hours per week. Effective July 8, 1942 the then Officer-in-Charge [Dickeman] directed that no overtime would be paid to weekly salaried employees regardless of the number of hours worked except for overtime performed on Sundays, when that overtime work was authorized, for which Sunday work compensation on straight time basis would be allowed. These instructions were modified on November 6, 1942 to the extent that weekly salaried employees were to be compensated after that date on a straight time hourly rate for overtime in excess of 48 hours a week that they worked. To compensate for the fact that commencing July 8, 1942 weekly salaried employees were placed on an unlimited time basis without additional compenation for hours worked in excess of 48 hours, increases in pay were granted weekly salaried employees."

This is recopied almost verbatim in the Contracting Officer's letter April 1, 1943, to the Bureau concerning the Nash claim, see footnote 7, supra.

Jackson, 8 Cir., 185 F.2d 74, cert. denied 342 U.S. 812, 96 L.Ed. 614.

These decisive actions completely refute the idea implicit in the District Court's findings that prior to July 11, 1942, no discussions were had between the Contracting Officer and Contractor on the inapplicability of FLSA, the matter of no overtime and the Bureau's refusel to allow it.

This brings it down, then, to the contention that these directives were not a sufficient declaration. It is to say that for the agency action to be ground for the escape, it must have been expressed in *terms* specifically rejecting the Fair Labor Standards Act by name. We find nothing in the Portal-to-Portal Act to sustain that artificial view; and, on the contrary, find much to refute it.

Congress, by the use of the words, "any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency * * *," risked redundancy to make it certain that the availability of Governmental action as the reason for the employer's act or omission should not depend upon its form. Likewise, the last sentence of Section 9 [29 U.S.C.A. 259] continuing the defense even though the ruling policy or practice is subsequently "determined by judicial authority to be invalid or of no legal effect" indicates that the legality of the order is altogether irrelevant. If an order naming the FLSA and giving a wrong interpretation of the Act is available as the escape, if followed, then the addition or deletion, the statement, partial or complete, of reasons

underlying the order becomes quite unimportant. The order or ruling was to be judged solely in the light of its command and effect and not upon its apparent reasonableness or correctness. If the necessary consequence of the instruction was to cause a course of action either contrary to FLSA or in conflict with its requirements, then that edict amounted, at least, to an agency practice.[14]

This analysis, with the rejection, detailed above, of the trial judge's so-called fact finding that the Bureau's policy had never been orally communicated to the Contractor thus affords a dual basis for our decision. We think that the directive of July 11, 1942 (and its amendments) was all that was required. It certainly established the *practice* by the Bureau that the overtime required by FLSA would not be paid. Since it was the Bureau which set labor policies for its CPFF contractors, all that the Contractor needed to know was the decision. Whether it was wise, or unwise, was not for it. It needed to know only what it could *pay*, for that which it *could pay*, it could get back.

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[14] Asselte v. 149 Madison Ave. Corp., S.D.N.Y., 90 Fed. Supp. 442; Kam Koon Wan v. E. E. Black, 9 Cir., 188 F.2d 558; Addison v. Huron Stevedoring Corp., S.D.N.Y., 96 Fed. Supp. 142, reversed on other grounds 204 F.2d 88; Rogers Cartage Co. v. Reynolds, 6 Cir., 166 F.2d 317; Lassiter v. Guy F. Atkinson, supra, Kenney v. Wigton-Abbot Corp., D.C.N.J., 80 Fed.Supp. 489; Blessing v. Hawaiian Dredging Co., D.C.D.C., 76 Fed.Supp. 557.

The orders here directed both positive action and express prohibitions; it was no mere approval of, or acquiescence in, a payroll routinely submitted, error in classification, field examination by inspectors, or the like, cf. Glowienke v. Hawaiian Dredging Co., N.D.Ill., 84 Fed.Supp. 678; Bauler v. Pressed Steel Co., N.D.Ill., 81 Fed.Supp. 172; Donahue v. Fuller, D.C.R.I., 104 Fed.Supp. 145; Burke v. Mesta Machine Co., W.D. Penn., 79 Fed.Supp. 588; Ferrer v. Waterman SS Corp., D.C. P.R., 89 Fed.Supp. 680; Knudsen v. Lee & Simmons, S.D.N.Y., 89 Fed.Supp. 400; Selby v. J. A. Jones Construction Co., 6 Cir., 175 F.2d 143; Brown v. Dunbar & Sullivan Dredging Co., 2 Cir., 189 F.2d 871; Day & Zimmerman v. Reed, 8 Cir., 168 F.2d 356.

The good faith reliance of Contractor is not really open to question. What was it to do? Had it paid FLSA overtime, it would have violated the July 11, 1942 directive. This would have been a flagrant disobedience subjecting it to the peril of contract penalties or foreiture. More important, the Contracting Officer's approval to the claims for payroll reimbursement, withheld because of his directive, would have left Contractor paying them out of its own funds. Whether it was mistaken or not, the Contracting Officer's act, there being no suggestion of conscious wrongdoing or fraud, was absolutely binding, *United States v. Wunderlich, supra; United States v. Moorman,* 338 U.S. 457, 94 L.Ed. 256, and the contract 30-day appeal would have been unavailing since the Bureau's policy was then and continued long to be fixed.

The plaintiffs acknowledged no argument that good faith did not require that the employer bear these costs out of its own funds. They insisted, though, that it was contractor's duty to remonstrate with these Governmental agencies. It is absured to say that it is the citizen who must prick the sovereign's conscience to advise it what its own law is and means. And if it had to, what was it to do? Must it have borne counsei fees for research and the inevitable and almost continuous conferences held for several years on this engaging subject by the Labor, Justice, War, Navy and other Executive Departments? Had the Contractor made his plea, what evidence is there to indicate that it would have been of any value? What reason is there to suppose that if pressed by Contractor in July 1942, the Navy Department's answer would have been any different from the April-May 1943 letters? What reason was there

for the Contractor thinking, in the first place, that FLSA did apply? Certainly, there was nothing but confusion in the Executive Branch. And in the Judiciary, as late (1948) as our decision in this very case, we thought these contracts were immune. The Supreme Court avoided decision that same year, *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 92 L.Ed. 1347, and it was not settled until 1950 by *Powell v. United States Cartridge Co.*, 339 U.S. 497, 94 L.Ed. 1017.

The Contractor was entitled to look to the Navy for its instructions. The Navy gave positive directives in keeping with its general interpretive policy. The Contractor relied upon instructions which were unequivocal. If it desired to remain as Contractor, it had no alternative but to comply, and Section 9 for prior acts in contrast to Section 10 for future acts gave no preeminence to the letter from the Wage and Hour Division expressing in April 1943 a view contrary to the Navy directives, *Lassiter v. Guy F. Atkinson, supra; Kam Koon Wan v. E. E. Black, supra; Addison v. Huron Stevedoring Co., supra.* Carrying out orders under such circumstances when there was nothing else to do is bound to be in good faith whether tested by the objective, *Campbell v. Jones & Laughlin Steel*, W.D.Pa., 96 Fed.Supp. 189, *Kam Koon Wan v. E. E. Black, supra*, or a more subjective, *Addison v. Huron Stevedoring Corp., supra*, standard.

The defense under Section 9 was amply sustained, and it validly extinguishes all liability. *Thomas v. Carnegie Illinois Steel Corp.*, 3 Cir., 174 F.2d 711. The consideration of this whole record leaves us with the certain and definite impression that the trial judge's decision is not the truth

and right of the case. Both by the intrinsic analysis which we have made and by the overriding impression of an injustice from the result, the fact findings and conclusions based on them will not withstand the scrutiny of FRCP 52a, and we reject them as clearly erroneous. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L.Ed. 746; *Sanders v. Leech*, 5 Cir., 158 F.2d 487; *Galena Oaks Corp. v. Scofield*, 5 Cir., 218 F.2d 217.

Section 9 extinguishes the entire claim and makes it, strictly speaking, unnecessary to discuss Section 11, 29 U.S.C.A. 260. Since it presents a matter closely related to Section 9, we think it appropriate to make clear that, independent of our decision on Section 9, *Wolferman v. Gustafson*, 8 Cir., 169 F.2d 759; *Brown v. Dunbar & Sullivan Dredging Co., supra*, we would reverse and render for the appellants the judgment awarding penalties and attorneys' fees on the penalties. In contrast to Section 9 which requires good faith reliance upon an administrative regulation, order, ruling, or practice, Section 11 demands only that the act was in good faith and that the employer had reasonable grounds for believing it was not in violation. This inquiry is committed to the "sound discretion" of the trial court, a decision which we would alter only on most compelling circumstances.

While the employer does not need the administrative ruling, policy or practice as a condition to the relief under this section, the existence of it is a factor bearing on his conduct. Surely, it is a reasonable thing for a Contractor, faced with a *fiat* forbidding the payment of overtime, to obey it when it emanates from a responsible, authoritative representative of the United States Government.

And, as we have pointed out, a belief that CPFF contracts were not under FLSA, while eight years and two courts later was finally held to be erroneous, certainly had "reasonable grounds." The suggestion that records were false or inaccurately kept is without any foundation. Detailed records were kept intended honestly to reflect the actual hours of work. To be sure there was a refusal to pay FLSA overtime, but it was an outright, candid position, forthrightly taken without stealth, subterfuge, or furtive machinations to make the facts appear to be something other than what they were.

We take it that the discretion under Section 11, while giving the widest latitude, yet imposes on the trial judge the duty of a reasoned, articulate judgment. To allow penalties here is to defy reason: whether the directive of July 11, 1942 was, or was not, a Section 9 ruling or practice, what could the Contractor have done in the face of it? Did he not have to obey it in fact if he were to retain the contract and was he not entitled to assume that he could place faith in the legal correctness of information coming from the branch of his Government responsible for this contract rather than some other?

The judgment is reversed and here rendered for Appellants.

REVERSED AND RENDERED.

A True Copy:
Teste:

(Signed) JOHN A. FEEHAN, Jr.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

Judgment of the United States Court of Appeals for the Fifth Circuit:

JUDGMENT

Extract from the Minutes of March 16, 1956.

M. T. REED, T. L. REED, JR., MRS. M. T. REED, MRS. T. L. REED, JR., and MRS. S. S. HAIRSTON, co-partners doing business as M. T. REED CONSTRUCTION COMPANY,

No. 15521. versus

EUGENE M. MURPHEY, JR., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellants;

It is further ordered and adjudged that the appellees, Eugene M. Murphey, Jr., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

FILED
AUG 6 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 159

EUGENE M. MURPHEY, JR., *et al.*,
Petitioners,

—v.—

M. T. REED, *et al.*, a co-partnership, d/b/a M. T. REED CONSTRUCTION CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Jackson, Mississippi

Attorneys for Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for Southern District of Mississippi is not officially reported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 232 F. 2d 668.

Jurisdiction

The judgment of the court of appeals was entered on March 16, 1956. The petition for certiorari was filed on June 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question Presented

Whether in the circumstances of this case respondents' failure, if any, to pay petitioners overtime compensation in accordance with the Fair Labor Standards Act was in good faith reliance on "any administrative regulation, order, ruling, approval or interpretation of any agency of the United States" or "any administrative practice or enforcement policy of any such agency . . . " within the meaning of Section 9 of the Portal-to-Portal Act.

Statutes Involved

Section 7(a) of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 U. S. C. 207(a)), and Sections 9 and 11 of the Portal-to-Portal Act (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C. 258, 260), are set forth in the Appendix, *infra*, pp. 17-18.

Statement

1. *Introduction.*

At all times material to this suit, respondents, as co-partners, were engaged in the construction of new Navy encampments at Gulfport, Mississippi or maintenance and operation of the Naval Advance Base Depot at Gulfport under separate cost-plus-a-fixed-fee contracts with the United States of America. The Government acted through the Secretary of the Navy who was represented by the Chief of the Bureau of Yards and Docks[1] (O. R. 31; Pl. Ex. 2, I. R. 110; II. R. 468-469).[2]

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1 5 U. S. C. 429 establishes the Bureau of Yards and Docks as one of the bureaus in the Navy. 5 U. S. C. 430 provides that "all of the duties of the bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such."

2 Record references are made herein as follows:

O. R.—refers to transcript of proceedings prior to remand in

Respondents performed the cost-plus contracts through separate and distinct organizations with separate and distinct payrolls (O. R. 32) under close supervision by the Navy and its representatives (O. R. 37-38, I. R. 74). Employees on the new construction payroll were called new construction employees, and employees on the maintenance and operations payroll were called "M & O" employees.

Of the 72 petitioners herein, all of whom were salaried employees, 51 were new construction employees, 10 were "M & O" employees and 11 were new construction employees during part of the period involved and "M & O" employees during the remainder.

2. *Agency orders, interpretation, practice and policy.*

At all times material to this action, petitioners' salaries, hours and overtime compensation were fixed in accordance with instructions and directions of the Bureau of Yards and Docks, Navy Department, acting through the Officer-in-Charge at Gulfport. As shown by the stipulated evidence and undisputed documents, the very overtime compensation practices, upon which petitioners base their claims, were adopted and followed by respondents pursuant to orders and directives of the Bureau (O. R. 44-52; I. R. 73-74, 104-105; II. R. 322, 446, 447, 450, 467, 469, 492; III. R. 510-511, 577-578, Def. Ex. 4, I. R. 67).

No. 12,173 in the United States Court of Appeals for the Fifth Circuit.

I. R.—refers to Volume I of transcript of proceedings on remand.

II. R.—refers to Volume II of transcript of proceedings on remand.

III. R.—refers to Volume III of transcript of proceedings on remand.

IV. R.—refers to Volume IV of transcript of proceedings on remand.

The evidence also conclusively shows that at all times material to this action, it was the interpretation, policy and practice of the Bureau of Yards and Docks that the Fair Standards Act did not apply to any work performed under cost-plus-a-fixed-fee contracts with the Bureau. Adopted on behalf of the Bureau by Admiral Morecll, its Chief, in February, 1941, this interpretation, policy and practice remained in effect until after the last date involved in any claim in this action (Def. Ex. 1, I. R. 62, *et seq.*; I. R. 58-60, 72, 76, 77-78; II. R. 245-246, 268, 271, 277, 440-441).

All the Officers-in-Charge stationed at Gulfport were advised of the Bureau's interpretation and policy. In accordance with directions of the Chief of the Bureau, they communicated it to the respondents (I. R. 60, 71-72; II. R. 276-278, 442, 445, 448, 477-478, 481, 484-485, 493-494, 500; III. R. 505, 513-514, 576-577, 647).

Respondents were first advised of the Bureau's interpretation and policy in June of 1942 by Commander Dickeman shortly after he came to Gulfport as Officer-in-Charge. He told the respondents that the Bureau's interpretation and policy was that the Fair Labor Standards Act did not apply to work performed under either the construction or the maintenance and operation contract. In July, 1942, he repeated this to the members of a wage board which included representatives of the respondents. Similar advice was given to respondents by the subsequent Officers-in-Charge at Gulfport; and the Bureau's Assistant Director of Labor Relations also advised respondents on a number of occasions that the Fair Labor Standards Act did not apply to work performed under the contracts here involved (I. R. 60-61, 72-73; II. R. 268, 276, 445).

The Bureau's interpretation and policy was communicated to Respondents in writing as well as orally. In

March of 1943, one of the petitioners submitted a claim for overtime compensation. After correspondence between the Officer-in-Charge and the Bureau (Def. Exs. 5 and 6, II. R. 299, *et seq.*), Commander Eckberg, who was then Officer-in-Charge, wrote to Mr. Nash as follows:

> "The decision referred to in my letter of 1 April has been received from the Bureau of Yards and Docks and is quoted in part as follows:
>
> "'With regard to the claim of [petitioner] Mr. Nash, it appears that he has been adequately compensated in accordance with his employment contract, and that no further compensation is due him. The Fair Labor Standards Act is not applicable to the work performed by Mr. Nash. Therefore he has no legal claim for time and one-half for work performed in excess of 40 hours per week.'
>
> "I shall, of course, abide by the decision of the Bureau of Yards and Docks in this matter."

Copies of this letter were sent to respondents' representatives (Def. Ex. 13, III. R. 507-508).

At about the same time, respondents received a letter dated March 31, 1943 from the regional director of the Wage and Hour Division which stated that the Division had some correspondence alleging violation of the Fair Labor Standards Act (III. R. 513; Pl. Ex. 18, II. R. 427-429). They promptly wrote to the Wage and Hour Division for further information, and at the same time submitted the correspondence to the Officer-in-Charge, "and asked in what manner he desired it handled." The Officer-in-Charge forwarded the matter to the Bureau in Washington (III. R. 513).

On May 11, 1943, the Chief of the Bureau of Yards and Docks wrote to the Officer-in-Charge at Gulfport as follows (Def. Ex. 7, II. R. 307-311):

> "Since the Bureau does not consider the work involved under the contract subject to the Fair Labor Standards Act, the Officer-in-Charge is advised that the Bureau will reimburse for no claim for additional compensation based upon that Act until such time as the contractor may be ordered to pay such claim by a Court of competent jurisdiction. Such suits as may be instituted to recover additional compensation under the Fair Labor Standards Act should be defended by the contractor with private counsel."

On May 17, 1943, the Officer-in-Charge advised respondents in writing ". . . the Bureau does not consider the work involved under this contract subject to the Fair Labor Standards Act . . ." and instructed respondents to defend any suits filed with private counsel (Def. Ex. 11, II. R. 451-452; II. R. 450; III. R. 513-514, 578).

Apart from the above express statements thereof, the Bureau's interpretation and policy was implicit in all its orders and directives relative to overtime compensation. The circular letters and other communications promulgated by the Bureau with respect to overtime compensation called for compliance with policies established by the Bureau, and not for compliance with the Fair Labor Standards Act. See, e.g., Def. Exs. 2, 3, 4 and 12, II. R. 282, 287, 291, 454, which prescribed overtime compensation practices inconsistent with those which would be required if the Act were applicable.

Throughout the period here involved, the respondents relied upon the Bureau of Yards and Docks as to all matters of labor policy, including the Fair Labor Standards Act; they believed, as the Bureau did, that the Act did not apply to the work performed at Gulfport; and they acted in conformity with the Bureau's orders, rulings, interpretation, policy and practice relative to overtime compensation and

the Fair Labor Standards Act. In complying with the Bureau's orders, rulings, interpretation, policy and practice, the respondents acted in good faith in accordance with their obligations under their cost-plus contracts with the Government. Any failure on their part to pay overtime compensation under the Fair Labor Standards Act to any of the petitioners was not motivated by personal gain, but resulted from the respondents' good-faith reliance upon and compliance with, the orders, rulings, interpretation, policy and practice of the Bureau of Yards and Docks, Navy Department (II. R. 322-323, 446-449, 450, 466-469, 471, 488, 492, 495, 500; III. R. 510-511, 529-530, 577).

3. *History of the case.*

This suit was brought by 123 claimants to recover overtime compensation, liquidated damages and counsel fees. The first trial before Judge Mize resulted in a judgment for 117 of them which was entered on April 1, 1947.

On appeal, the Court of Appeals reversed. 168 F. 2d 257.[3]

On petition for certiorari, this Court in a *per curiam* opinion ruled (335 U. S. 865):

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3 The Fifth Circuit rested its decision on the proposition that "employees of a wartime cost-plus-a-fixed-fee contractor with the United States Government employed during a war in operations vital to the war effort" are not engaged in commerce or in the production of goods for commerce. 168 F. 2d 263. It stated that, even apart from this: (1) plaintiffs were not engaged in commerce; (2) work such as that performed by 89 plaintiffs solely in local intrastate building activities, has uniformly been held to be outside the Act; (3) plaintiffs had wholly failed to discharge their burden of proving that they, as distinguished from their employers, were engaged in commerce or in activities so closely related to commerce as to bring them within the Act; and (4) that even if the Act were applicable to respondents and petitioners: (a) certain plaintiffs

> "The petition for writ of certiorari is granted. The judgments below are vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely construction work, and to reconsider the remaining causes of action in the light of the decision of this Court in Kennedy v. Silas Mason Co., 334 U. S. 249."[4]

After the case had been remanded, the respondents moved for leave to amend their answers to assert separate defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947 and certain other defenses. No objection was raised by the petitioners, and, pursuant to leave granted by the

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were clearly within the executive, administrative, and professional exemption established by Section 13(a)(1) of the Act; (b) the "Navy" employees who were hired, discharged, and worked solely under the control and supervision of the Navy and its representatives were, in fact, employees of the Navy Department and not of the defendants; (c) the amounts awarded for overtime compensation and liquidation damages were erroneously computed on a regular hourly rate based upon a fictitious forty-hour workweek and were, therefore, excessive; (d) plaintiffs' claims for liquidated damages were subject to the one-year statute of limitation prescribed by Section 731, Mississippi Code 1942; and (e) in any event, defendants were still entitled to assert new defenses authorized by the Portal-to Portal Act, which was enacted after entry of the judgment of the District Court. *Id.* at 261-263.

One Judge, Circuit Judge Hutcheson, dissented from the conclusion of the majority on the issue on which its decision was based, but noted he was greatly impressed with some of the reasons advanced by the majority of this Court for their view that plaintiffs had failed to sustain their burden of proving that they, as distinguished from their employer, were engaged in covered activities. *Id.*, at 263-264.

4 Mr. Justice Rutledge was of the opinion that the case as a whole should be remanded to the District Court for further proceedings in view of the decision of the Supreme Court in the *Kennedy* case, *supra*. Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy dissented.

District Court, the respondents served and filed an amendment pleading those defenses (I. R. 23-32).

In the proceedings on remand, the parties stipulated, as they had upon the original trial, that respondents' request for admission of fact and the petitioners' reply thereto should constitute the factual proof in the case, subject to the right of either party to introduce additional evidence (I. R. 50-51). Practically all the evidence introduced on remand related to the defenses asserted by the respondents under Sections 9 and 11 of the Portal-to-Portal Act of 1947. Apart from the minor, immaterial exception noted below, no additional evidence was introduced concerning the nature of the work performed by any petitioner.[5]

On February 1, 1954, Judge Mize ruled that the causes of action of the 72 petitioners should be allowed in whole or in part, and that the remaining causes of action should be dismissed.

On appeal, the Court of Appeals for the Fifth Circuit again reversed and rendered for respondents. In a unanimous opinion, the Court held that the good faith reliance defense under Section 9 of the Portal-to-Portal Act was amply sustained, and that it validly extinguished all liability. The Court pointed out that under Section 11 of that Act, "independent of our decision on Section 9 . . . we would reverse and render for the appellants [respondents] the judgment awarding penalties attorneys' fees on penalties." The Court also noted that the case presents "many complex, important additional matters of partial or com-

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5 Only two witnesses testified on behalf of the petitioners. Their testimony related to documents concerning payroll matters, and on cross-examination one of them described the manner in which time checking was performed and also referred briefly to the fact that he had started as a time checker and later became chief Navy timechecker (III. R. 658-668).

plete defense[6] not reached or passed on . . . because, in our judgment, it turns on the good faith escape provisions of the Portal-to-Portal Act." 232 F. 2d 677, 671.

Argument

The basic issue presented by the petitioners is essentially factual: whether in the circumstances the respondents' failure to pay overtime compensation for hours worked in excess of forty in any workweek was in good faith reliance on the orders, interpretation, policy or practice of an agency of the United States. The case does not involve any novel question of law requiring authoritative determination by this Court. There is, so far as we have been able to ascertain, no similar case pending. And, the present problem cannot arise again since Section 9 of the Portal-to-Portal Act applies only to acts or omissions which occurred prior to the enactment date, May 14, 1947. As to

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6 These defenses include the following: (1) the activities of all but a few of the 62 petitioners who were allowed recovery by the District Court for periods of employment as new construction employees involved solely construction work and should have been dismissed pursuant to the mandate of this Court; (2) the petitioners failed to sustain their burden of proving that they themselves, as distinguished from their employers, were engaged in commerce or production of goods for commerce; (3) the "Navy" employees who performed no work for respondents, but performed all their work for and under the supervision of Navy officials and who were hired and terminated by such officials, were employees of the United States and as such were excluded from the Fair Labor Standards Act by Section 3(d) of that Act; (4) seven of the petitioners were within the executive, administrative or professional exemption established by Section 13(a)(1) of the Fair Labor Standards Act; (5) the amounts awarded by the District Court for overtime compensation and liquidated damages were computed on a regular hourly rate based upon a fictitious forty-hour workweek and were, therefore, excessive; and (6) petitioners' claims for liquidated damages were subject to the one-year limitation prescribed in Section 731, Mississippi Code, 1942.

acts or omissions after that date, the Act recognizes only reliance upon rulings of the Wage and Hour Administrator. See Section 10 (b)(1) of the Portal-to-Portal Act. In any event, the decision of the Court of Appeals that the respondents' good faith reliance under Section 9 was "amply sustained" is clearly correct and should not be reviewed by this Court.

1. Federal appellate and district courts have reached the same conclusion and sustained the good-faith reliance defense in many other cases in which the facts were similar to those here involved.

Lassiter v. *Guy F. Atkinson Co.*, 9 Cir., 176 F. 2d 984 (1949);
Wan v. *Black Ltd.*, 9 Cir., 188 F. 2d 558; cert. den. 342 U. S. 826;
Northwest Airlines, Inc. v. *Jackson*, 8 Cir., 185 F. 2d 74 (1950); cert. den. 342 U. S. 812;
Blessing v. *Hawaiian Dredging Co.*, D. C. D. C., 76 F. Supp. 556 (1948);
Kenney v. *Wigton-Abbott Corp.*, D. C. N. J., 80 F. Supp. 489 (1948);
Donahue v. *George A. Fuller Co.*, D. C. R. I., 104 F. Supp. 145 (1952);
French v. *McWilliams Dredging Co.*, N. Y. Sup. Ct. App. T., 195 Misc. 90, 88 N. Y. S. 2d 838 (1949).

In *Lassiter* v. *Guy F. Atkinson Co., supra*, the good-faith reliance defense was based upon communications from the War Department, the Corps of Engineers, the Contracting Officers and War Department Wage Administration Agency which prescribed overtime practices inconsistent with the requirements of the Fair Labor Standards Act. In sustaining the defense, the court held (176 F. 2d at 995):

"We also think that the court had sufficient grounds for finding that the employers were justified, as reasonable men, in believing that the numerous directions of the War Department as to overtime payments at rates entirely inconsistent with those which the Fair Labor Standards Act would require, were sufficient to furnish assurance that they could safely disregard the provisions of that Act. We think that such an assurance was implied in those communications, notwithstanding most of them contained no express reference to the Act . . ."

In the instant case, the factual support for the Section 9 defense is considerably stronger. Here the Bureau of Yards and Docks not only directed overtime practices inconsistent with the Fair Labor Standards Act, but also expressly advised respondents that that Act was not applicable to work performed under cost-plus-a-fixed-fee contracts with the Bureau. These orders and interpretations of the Bureau clearly justified respondents' belief that the Fair Labor Standards Act did not apply to the work here involved.

In *Kenney* v. *Wigton-Abbott Corp.*, *supra*, the defendants had relied on a Circular Letter of the Bureau of Yards and Docks which contained instructions for payment of compensation for employment in excess of the normal workweek. The evidence showed that the letter had been communicated to the defendants by the Officer-in-Charge, and payrolls were checked to ensure conformity with the Circular Letter. The court held that the defendants' good-faith reliance and compliance with, the Circular Letter constituted a complete defense under Section 9 of the Portal-to-Portal Act of 1947.

In *Blessing* v. *Hawaiian Dredging Co., supra,* and *Donahue* v. *George A. Fuller Co.,*[7] *supra,* similar defenses involving the Bureau of Yards were sustained.

In the instant case, the evidence conclusively shows that the Bureau's orders, rulings, interpretation and policy were communicated to the respondents prior to any failure on their part to pay overtime compensation in accordance with the Fair Labor Standards Act. The Bureau's orders, rulings, interpretation and policy remained in effect throughout the period here involved. Any failure on the part of the respondents to pay overtime compensation under the Fair Labor Standards Act was occasioned by their reliance on, and compliance with, the Bureau's orders, rulings, interpretation and policy. Such reliance and com-

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7 In the *Donahue* case, *supra,* the defense was rejected as to part of the period involved for lack of communication of the Bureau's ruling to the contractor; it was upheld as to the period subsequent to communication of the ruling. *Glowienke* v. *Hawaiian Dredging Co.* (N. D. Ill., 84 F. Supp. 678), is the only case in which such a defense involving the Bureau of Yards and Docks was completely rejected. We have studied the record in that case, and find that it may be possible to rationalize the result reached on the basis of the insufficiency of the proof of communication of the Bureau's interpretation or policy. However, the reasons stated by the court for its decision are completely erroneous. Thus its statement that the contractors secured no rulings from the Wage and Hour Division assumed an obligation which never existed; and it ignored the express provisions of Section 9 of the Portal-to-Portal Act which gives a defense to employers who relied on the interpretation of *any agency* of the United States. Similarly, its reference to court decisions rendered shortly after the contractors started their operations completely ignored the fact that those decisions did not modify, rescind or invalidate the Bureau's interpretation; and it ignored the court decisions which supported the Bureau's interpretation. See, e.g., *Trefs* v. *Foley Bros., Inc.*, W. D. Mo., 7 Labor Cases Par. 61,743 (July 9, 1943), not officially reported; *Matlock* v. *Sanderson & Porter*, Cir. Ct. Ark., 7 Labor Cases Par. 61,806 (August 9, 1943); *Reed* v. *Murphy*, 5 Cir., 168 F. 2d 257 (1948) and cases cited therein.

pliance were in good faith in recognition of the respondents' obligations under their contracts with the Government and the practical realities of the situation, and were free from any motive of personal gain or advantage. *Supra*, pages 4-7.

2. The petitioners' argument that the decision in this case is in conflict with the decisions of this Court in *Steiner* v. *Mitchell*, 350 U. S. 247 and *Mitchell* v. *King Packing Co.*, 350 U. S. 260, is clearly devoid of merit. In the *Steiner* case, *supra*, and the *Mitchell* case, *supra*, the issue was whether time spent in certain activities was compensable working time within the meaning of Section 4 of the Portal-to-Portal Act, and the cases involved activities which occurred after May 14, 1947, the enactment date of the Act. In the instant case, the issue before this Court arises under Section 9 which authorizes a good-faith reliance defense as to acts or omissions occurring prior to the enactment date.

3. Petitioners' argument that the decision in this case is in conflict with the decisions of this Court in *Kennedy* v. *Silas Mason*, 334 U. S. 249, and the mandate of this Court in this case is also devoid of merit. Neither the decision in the *Kemedy* case, *supra*, nor the mandate of this Court in this case dealt with Section 9. The Section 9 defense was not before this Court at the time its mandate was issued. It was subsequently pleaded in the proceedings on remand by leave of the District Court and without objection by the petitioners (I. R. 23-32). It is clearly applicable to the instant case.

4. Petitioners' assertion that the Court of Appeals "is not authorized to completely overturn the findings of fact and conclusions of law based upon them as found by the

District Court, where the evidence overwhelmingly and amply sustains the finding of fact made by District Court, Federal Rules of Civil Procedure, 52 (a)" is not supported by any reference to evidence in the record. This is not surprising since the record clearly does not support any such assertion.

The only reference in the petition to any finding appears at page 3 thereof, where petitioners seek to intimate that the Court of Appeals was not correct in reversing the District Court, "particularly in view of the [District] Court's finding of fact sustained by overwhelming testimony, that the Defendants falsified their books and records in order to keep the time in accordance with their interpretation of the Act (District Court's Opinion, R. 899)." This finding is plainly contradicted by the stipulated evidence which shows that there was no falsification of records in this case.[8]

As the Court of Appeals stated (232 F. 2d at 677):

> "The defense under Section 9 was amply sustained, and it validly extinguishes all liability. *Thomas* v. *Carnegie Illinois Steel Corp.*, 3 Cir., 174 F. 2d 711. The consideration of this whole record leaves us with the certain and definite impression that the trial judge's

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8 While the payroll records did not reflect the actual hours worked during part of the period here involved, the daily attendance records did. During that period, the payroll records were kept in accordance with pay practices prescribed by the Officer-in-Charge. This involved no falsification or misrepresentation of any kind. No attempt was made to indicate that time and one-half was being paid for hours worked in excess of forty per week. No misrepresentation was made to the Officer-in-Charge or anyone else. The stipulated evidence shows that the payroll records, as well as the other records, "were at all times maintained in accordance with the instructions of the Officer-in-Charge and any changes in the manner of keeping those records were effected as a result of his direction." (O. R. 43-44; Def. Ex. 4, I. R. 68, *et seq.*) The actual hours of work appear in O. R. 118-310.

decision is not the truth and right of the case. Both by the intrinsic analysis which we have made and by the overriding impression of an injustice from the result, the fact, findings and conclusions based on them will not withstand the scrutiny of F. R. C. P. 52a, and we reject them as clearly erroneous. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; *Sanders* v. *Leech*, 5 Cir., 158 F. 2d 486, 487; *Galena Oaks Corp.* v. *Scofield*, 5 Cir., 218 F. 2d 217."

CONCLUSION

For the reasons set forth above, the petition for certiorari herein should be denied.

Respectfully submitted,

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APPENDIX

Statutory Provisions Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., 201 *et seq.*), read as follows:

* * * * *

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

The pertinent provisions of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., 1st Sess.), read as follows:

* * * * *

Sec. 9. Reliance on Past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or

overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * * *

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.

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